COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

BIRNBAUM & GODKIN, LLP, GROSS & KLEIN, LLP, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN MATEO, Respondent.	Case No. A156945
FACEBOOK, INC., ET AL., Real Parties in Interest.	

RESPONSE TO PETITION FOR PEREMPTORY WRIT OF PROHIBITION OR OTHER APPROPRIATE RELIEF, AND REQUEST FOR IMMEDIATE STAY

FROM THE SUPERIOR COURT
COUNTY OF SAN MATEO, CASE NO. CIV 533328
Honorable V. Raymond Swope, (650) 261-5123

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR	COURT OF APPEAL CASE NUMBER: A156945
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APPELLANT/ PETITIONER: Birnbaum & Godkin, LLP et al. RESPONDENT/ REAL PARTY IN INTEREST: Superior Court for the County of San Mateo; Facebook, Inc., et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Facebook, Inc.

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Mark Zuckerberg	Ownership interest of 10% or more in Facebook, Inc.
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 17, 2019

Catherine Y. Kim
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Facebook, Inc. ("Facebook") agrees with the petitioning lawyers that this is an extraordinary case. But not for the reasons they say. The trial court has found that Six4Three, LLC ("Six4Three") and its legal team—including the very lawyers that seek this writ—together engaged in a widespread crime or fraud to publicize confidential and highly confidential information produced by Facebook in reliance on the trial court's Stipulated Protective Order. (PA528:9-PA536:11.)

The result of that crime or fraud was the unprecedented international publication of hundreds of pages of internal Facebook data and documents (including highly confidential and trade secret materials)[1] in direct violation not only of the trial court's protective order, but also an order sealing those materials and a separate, direct order that those materials not be disclosed absent express permission from the trial court. Its consequences continue to reverberate to this day—for Facebook, and, more fundamentally, for the litigation process the trial court and this Court are tasked with overseeing. Since the original leak in November 2018 and as recently as yesterday, there have been dozens (if not hundreds) of international media reports revealing (selectively) the contents of the leaked documents. More broadly,

[1] The full scope of the breach is not yet known. The trial court has permitted discovery to go forward to allow it—and Facebook—to get to the bottom of exactly what was leaked, by whom, and to whom.

as the trial court has already found, the crime or fraud by Six4Three and its lawyers of breaching multiple orders and publishing protected documents has created an "unconscionable" derogation of the foundation for discovery in civil cases and a fundamental "compromise of the integrity of this judicial system." (RA274:12-16, RA229:20-26; see also RA524:6-RA525:19 ["This compromises the entire integrity of stipulated protective orders and by extension to American jurisprudence. . . . If lawyers cannot rely upon the agreement by another lawyer to keep things confidential pursuant to a stipulated protective order, then we've all lost."].)

After getting caught working with their clients to trample on the trial court's orders (not to mention Facebook's rights), the lawyers at Birnbaum & Godkin, LLP ("Birnbaum & Godkin") and Gross & Klein LLP ("Gross & Klein") suddenly decided—after years of litigating the case even in the face of previous sanctions and losses—that they have an irreconcilable conflict that requires them to drop this case. They moved to withdraw, and their motions are under submission. Unless and until the trial court grants Birnbaum & Godkin and Gross & Klein's motions to withdraw, they remain counsel for Six4Three and must represent Six4Three. (See Rules Prof. Conduct, rule 1.16 com. 4.) It is this interim representation—while the trial court considers their motions to withdraw—that Birnbaum & Godkin and Gross & Klein seek to stay.

That relief might appear anodyne in an ordinary case[2]—but this is no ordinary case. Birnbaum & Godkin and Gross & Klein are not being asked to engage in broad-ranging representation of a client with whom they have a supposed conflict.[3] ***The only live issue*** before the trial court is the trial court's investigation into the breaches of the trial court's orders and the related crime or fraud. Aside from that, the case is stayed while the trial court's anti-SLAPP rulings are on appeal. In other words, the only representation of their client that Birnbaum & Godkin and Gross & Klein are seeking to stay is representing their client in ***targeted discovery into the crime or fraud they committed together***.

For that very reason, Birnbaum & Godkin and Gross & Klein have failed to show how they would suffer any irreparable injury absent a stay. Birnbaum & Godkin and Gross & Klein do not deny that, no matter the

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[2] In reality, even in an ordinary case, the relief requested is improper. In effect, Birnbaum & Godkin and Gross & Klein seek to end-run around the trial court's authority and get the relief they sought in their motions to withdraw—to stop representing Six4Three—by requesting a stay until the trial court rules on the motions. For that reason alone, this writ is premature and interferes with the "orderly administration of justice at the trial and appellate levels." (*Omaha Indemnity Co. v. Superior Court (Greinke)* 209 Cal.App.3d 1266, 1272.)

[3] Although the trial court has not ruled on the motions to withdraw, it has denied the precise relief being sought here in part because it found that Six4Three's counsel have "repeatedly asserted without articulating how allegations of misconduct creates an unwaivable conflict between Six4Three and its counsel under this rule." (PA642:6-8.)

outcome of the motion to withdraw, they will be subject to the trial court's jurisdiction to investigate the multiple breaches of its orders and the related crime or fraud. The only question is whether they have articulated some cognizable prejudice from continuing to represent their client in that very same investigation (which, at this point, involves the production of documents and setting of a forensic examination procedure) for a few weeks while the trial court decides whether they are allowed to withdraw or not. As the trial court found in denying the same relief being requested here, they have not. (PA642:6-8.)

On the other hand, a stay would serve only to exacerbate the ***substantial prejudice*** that Facebook continues to suffer. Since these breaches came to light, Six4Three's principal and every member of its legal team have found lawyers (in some cases, multiple lawyers across multiple firms) to represent them in their individual capacities. (PA348:2-12.) But somehow, the same individuals cannot seem to find a single lawyer to represent Six4Three as an entity.[4] Facebook has no objection to Six4Three retaining new counsel—that is their right. But Six4Three has had nearly

[4] Based on the declaration he submitted to the trial court, Six4Three's principal does not appear to have made a serious effort to retain new counsel. (PA381-82 ¶¶ 5-13.) Nor is there any incentive for Six4Three to retain new counsel—once it does so, there will be no excuse for Six4Three and the various individuals involved to delay or avoid the trial court's investigation into these events.

five months to retain new counsel so that Birnbaum & Godkin and Gross & Klein can withdraw, and it has not done so, even as Six4Three's principal found ***three*** lawyers to represent him within a week. (PA348:2-5.) As a result, if this Court were to grant the requested stay and Six4Three's current lawyers were permitted to stop representing their client altogether, the trial court's investigation into the violations of its orders—including trying to get to the bottom of ongoing leaks of thousands of pages of highly confidential documents to the media and figuring out what might be done to stop them—would grind to a halt. It is not legitimate for Six4Three's failure to retain new counsel to further delay Facebook's right and the trial court's obligation to understand the full extent of Six4Three and its legal team's violations of the trial court's orders. ***That investigation is the only emergency here.***

FACTUAL AND PROCEDURAL BACKGROUND

Birnbaum & Godkin and Gross & Klein represent Six4Three, a failed app developer that built one app: Pikinis. (RA65 ¶¶ 104-05.) Pikinis enabled its users to automatically search through all of their Facebook friends' photos to find their bikini photos and tag them for later viewing. (*Ibid.*)

Theodore Kramer is Six4Three's CEO, and Thomas Scaramellino is, via an LLC, Six4Three's investor and a key third-party witness in this case. (PA381 ¶ 2; RA455 ¶¶ 2-3.) Mr. Scaramellino is not admitted to the bar,

but has worked on this case as a member of Six4Three's legal team under the supervision of Mr. Godkin of Birnbaum & Godkin. *See infra*.

I. The Current Proceedings in the Trial Court Relate to a Narrow Issue: the Disclosure of Facebook's Confidential or Highly Confidential Information to Unauthorized Third Parties.

In the trial court case, the parties entered into a Stipulated Protective Order, which provided that:

> Any persons receiving Confidential Information or Highly Confidential Information shall not reveal or discuss such information to or with any person who is not entitled to receive such information, except as set forth herein.

(PA529:4-8.) In December 2016, Facebook began producing documents designated as confidential or highly confidential. (PA529:8-9.)

In May 2018, Six4Three lodged thousands of pages of Facebook's confidential or highly confidential documents under seal, ostensibly in connection with their opposition to an anti-SLAPP motion. (RA138-46.) The trial court struck or sealed nearly all of these documents, finding that the stricken portions were irrelevant to Six4Three's opposition to the anti-SLAPP motion, and that an "overriding interest" supported sealing most of the documents. (RA141-46.)

Despite the Stipulated Protective Order's prohibition against disclosing confidential or highly confidential information, Six4Three and its counsel began disseminating summaries of Facebook's protected information to third parties. (PA529:15-16.) "The summaries at issue not

only summarize[d] the allegations, but also analyze[d] in detail the confidential information obtained from Facebook." (PA529:16-17.) In addition to disclosing summaries of Facebook's protected information to persons that were not entitled to receive such information under the protective order, Six4Three's counsel shared their own "analysis of Facebook's confidential information," and invited recipients to "find an 'appropriate mechanism' to permit disclosure" of Facebook's documents to them. (PA530:2-8.) In fact, Six4Three's counsel, its principal Mr. Kramer, and its investor-cum-legal-team-member Mr. Scaramellino discussed Facebook's confidential information with third parties and discussed using a retained expert as a source for the media. (PA530:22-26.) (Mr. Scaramellino worked on Six4Three's legal team under Mr. Godkin's supervision, even though Mr. Scaramellino was not and is not admitted to the bar. [PA532:18-PA533:5; PA483:13-23].)

The trial court found that the "evidence reflects that Six4Three, through its principal Mr. Kramer, utilized the services of counsel to aid in committing a crime or fraud." (PA533:19-20.) In addition to the disclosures of Facebook's information identified above, Mr. Kramer, Six4Three's principal, also communicated with a member of the United Kingdom Parliament "on finding an 'appropriate mechanism' to disclose to [the Digital, Culture, Media, and Sport Committee of Parliament]" Facebook's confidential information. (PA533:22-23.) Mr. Kramer reached

out to the MP and sent him a summary of Facebook's information "essentially the same as the one sent by Six4Three's counsel" to other third parties. (PA533:27-28.) Mr. Kramer then confirmed to the MP that he had documents containing Facebook's protected information in his possession, and agreed to accept service of a subpoena for those documents. (PA534:14-15.)

This is curious, as the trial court noted, because it is "unexplained . . . how Six4Three's counsel caused Facebook's confidential information and highly confidential [information] received pursuant to the Stipulated Protective Order to be . . . available for viewing and download on its client, Six4Three's Dropbox account." (PA535:9-12.) Only Birnbaum & Godkin and its employees "had access to Facebook's confidential and highly confidential information," which was stored on a document hosting platform and on Birnbaum & Godkin's secure server. (PA535:26-36:3.) Mr. Godkin did not claim that the security of his firm's server or the document hosting platform had been compromised. (PA536:5-6.) The only possible conclusion was thus "that Birnbaum & Godkin caused Facebook's confidential and highly confidential information to be uploaded on Six4Three's Dropbox." (PA536:7-8.) From Six4Three's Dropbox, Mr. Kramer accessed Facebook's confidential and highly

confidential information and disclosed it to the MP.[5] (RA184 ¶ 18.) Many of the documents that Mr. Kramer disclosed appear to be the same documents relating to Six4Three's anti-SLAPP opposition that the trial court had sealed. (*Compare* PA534:12-15 [Mr. Kramer confirmed his possession of the "Godkin anti-SLAPP Declaration" and exhibits thereto] *and* RA184 ¶ 18 [Mr. Kramer gave documents "related to the anti-SLAPP opposition papers" to the MP] *with* RA144:18-RA146:11 [striking or sealing nearly all of the redacted portions of the same declaration and the exhibits thereto].)

Based on the evidence presented and after a lengthy hearing, on March 15, 2019, the trial court issued an order finding that Facebook had made "a prima facie showing that the services of . . . Six4Three's counsel was sought or obtained to aid Six4Three in committing a crime or fraud and the crime-fraud exception applies." (PA536:9-11.) The trial court further held that the "attorney-client privilege is waived pursuant to the crime-fraud exception." (PA539:16-17.) The trial court then opened discovery strictly for the limited purpose of investigating "the revealing or discussing of Facebook's confidential information pursuant to Stipulated Protective

[5] In addition to violating the Stipulated Protective Order, Mr. Kramer's disclosure of Facebook's documents to the MP also violated the trial court order sealing the majority of these documents, and the trial court's subsequent order explicitly prohibiting the disclosure of these documents to the MP. (RA145:15-24; RA223; RA148:9-11 & 19-21.)

Order, paragraph 6 and disclosures or providing thereof." (PA539:4-6.) The trial court explicitly stated that discovery on the merits of the case "remain[ed] stayed," in light of the parties' pending appeals on anti-SLAPP motions. (PA539:7.) The trial court then granted Facebook leave to serve document requests and/or subpoenas duces tecum on Mr. Gross of Gross & Klein, Mr. Godkin of Birnbaum & Godkin, Mr. Kramer, and Mr. Scaramellino, with depositions to proceed after document production. (PA539:12-15.)

II. Birnbaum & Godkin and Gross & Klein Continue to Actively Represent Six4Three While Belatedly Claiming a Conflict.

After several months of working with Six4Three to publicize Facebook's confidential information, Birnbaum & Godkin and Gross & Klein suddenly claimed that "ethical issues" precluded them from remaining in the case. (RA261:9-11.) This was despite the fact that working with Six4Three to violate the trial court's orders had not apparently presented any conflict or ethical issue. At a November 30 hearing regarding Mr. Kramer's disclosure of Facebook's confidential and highly confidential documents to the U.K. Parliament, Birnbaum & Godkin and Gross & Klein asserted the existence of "ethical issues" for the first time. (RA243:6-19; RA261:9-11.) They did not identify the alleged ethical issues or explain why those issues created a conflict with their continued representation of Six4Three. (*Ibid.*) In the face of such an

unpersuasive, unspecific assertion of conflict, the trial court ruled that Birnbaum & Godkin and Gross & Klein "shall remain in this case and shall not withdraw from representation of plaintiff until the matters in relation to the distribution of those confidential documents is resolved." (RA276:19-26.)

After Birnbaum & Godkin's initial suggestion on November 30, 2018, that "serious issues" might prevent them from continuing to represent Six4Three, Birnbaum & Godkin and Gross & Klein did not move to withdraw as counsel for over a month. (PA281-82; PA296-97.) (They did, however, find counsel to represent them, as did Mr. Kramer and Mr. Scaramellino. [PA348:8-12].) In the meantime, they substantively represented Six4Three: they responded to document subpoenas on Six4Three's behalf, and filed a notice of appeal of the trial court order sealing the bulk of the documents Six4Three had lodged under seal and that Mr. Kramer had subsequently disclosed to the U.K. Parliament. (PA344; RA298.) They then moved to withdraw on January 8, 2019. (PA281-82; PA296-97.) Even while the motions were pending, they substantively represented Six4Three and opposed Facebook's motion to open discovery for the limited purpose of investigating the disclosure of Facebook's confidential and highly confidential information. (PA394.) Their delay in moving to withdraw undermines any claim that this Court should grant the extraordinary relief of a writ—given that there was no apparent urgency to

Birnbaum & Godkin and Gross & Klein's claims of a conflict for over a month after the trial court initially ordered them remain in the case, there can be no urgency now.

On March 13, 2019, the trial court heard argument on Birnbaum & Godkin and Gross & Klein's motions to withdraw. (PA478:22-479:1.) The trial court initially indicated that it would deny the motion and find that without further evidence, there was "no conflict." (PA483:24-484:6.) After hearing extended argument, the trial court took the motions under submission. (PA513:2-6.)

After the trial court took the motions to withdraw under submission, Gross & Klein filed a civil case information statement in Six4Three's appeal of the trial court's sealing orders. (PA642-43; RA574-78.) Birnbaum & Godkin and Gross & Klein claim in their petition that the trial court's March 15 order creates an unwaivable conflict that requires the extraordinary remedy of a writ. (Pet. at 29-30.) But they did not seek a petition for writ after the March 13 hearing on their motions to withdraw. They did not seek a petition for writ after the March 15 order opening limited discovery. They waited nearly two weeks to file an *ex parte* application to stay the March 15 order. (PA549.) The trial court denied the *ex parte* on April 2 (PA640), and Birnbaum & Godkin and Gross & Klein delayed another eight days before filing their petition for a writ. (Pet. at 33-34.) At every step of the way, Birnbaum & Godkin and Gross & Klein

have actively represented Six4Three, even as they delayed in seeking relief from their representation. Their behavior shows that no unwaivable conflict exists, and that there is no need for extraordinary relief via writ.

APPLICABLE LEGAL STANDARDS

A writ of mandate is an extraordinary remedy, and should only be granted under extraordinary circumstances, and only if (a) petitioner lacks "a plain, speedy, and adequate remedy, in the ordinary course of law," and (b) petitioner will suffer irreparable harm if the petition is not granted. (Code Civ. Proc., § 1086; *Los Angeles Gay & Lesbian Center v. Superior Court (Bomersheim)* (2011) 194 Cal.App.4th 288, 299-300.) Even if a trial court ruling is incorrect, the appellate court is not required to grant immediate writ review; it may instead leave review of the issue to await an appeal from the final judgment. (*Omaha Indemnity Co.*, *supra*, 209 Cal.App.3d at p. 1268.)

ARGUMENT

Six4Three and its legal team's brazen violations of multiple court orders and disclosure of confidential and highly confidential documents obtained in discovery are extraordinary, but the circumstances Birnbaum & Godkin and Gross & Klein complain of now are not. They have failed to demonstrate any direct conflict during this interim period in which the Court is considering their motions to withdraw, or why they are irreparably harmed by having to continue to represent their client (as they are duty-

bound to do) for a few weeks to allow basic discovery to proceed on the narrow issue of Six4Three and its legal counsel's breaches of the trial court's orders and the related crime or fraud.[6] The Court should deny the petition.

I. Birnbaum & Godkin and Gross & Klein's Petition is Premature.

The trial court has not yet ruled on Birnbaum & Godkin and Gross & Klein's motions to withdraw as counsel. Those motions are under submission, and will be decided in under two months. (Pet. at 9.) If, at that point, the trial court were to deny the motions to withdraw, Birnbaum & Godkin and Gross & Klein could appeal or file a petition for writ. That is the adequate remedy at law required by Code of Civil Procedure section 1086—if the trial court denies the motions to withdraw, Birnbaum & Godkin and Gross & Klein may appeal or file petitions for writ for relief from that order.

But by requesting a stay of all proceedings until the trial court rules on the motions to withdraw, Birnbaum & Godkin and Gross & Klein are trying to get the relief sought by their motions—relief from representing Six4Three—even before the trial court rules. This is not grounds for extraordinary relief. Rather, it is an example of exactly the conduct that the

[6] As noted, general discovery and progress on the merits of the case remain stayed as a result of the parties' consolidated appeals regarding the trial court's anti-SLAPP orders. (PA539.)

Court of Appeal cautioned against in *Omaha Indemnity Co.*:

> [I]f it were granted at the drop of a hat, [writ review] would interfere with an orderly administration of justice at the trial and appellate levels. . . . If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ . . . to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to nisi prius tribunals. . . . [and] would be trapped in an appellate gridlock.

(*supra*, 209 Cal.App.3d at pp. 1272-73 (quoting in part from *Mitchell v. Superior Court* (1958) 50 Cal.2d 827, 833-834 [J. McComb conc. opn.]).) Just as in *Omaha Indemnity Co*., Birnbaum & Godkin and Gross & Klein are attempting to "halt the proceeding in the trial court by applying for a writ," even though the trial court will rule on their motions to withdraw in less than two months. This interferes with the "orderly administration of justice," and is an attempt to obtain relief from an appellate court before the trial court has even ruled.

Moreover, to the extent that Birnbaum & Godkin and Gross & Klein claim that they would be injured if forced to continue representing Six4Three for a few weeks in the limited discovery permitted by the trial court's March 15 order (which is the only issue that is live at the trial court), adequate remedies at law exist. Because the alleged injury arises

from the trial court's March 15 order permitting that discovery, Birnbaum & Godkin and Gross & Klein could have sought reconsideration of, or filed a petition for writ relief from the March 15 order. (Code Civ. Proc., §§ 1008, 1085.) They did not. In fact, it has been more than a month since the trial court issued its March 15 order, and Birnbaum & Godkin and Gross & Klein have not sought any remedy at all from that order. Instead, they ask this Court to absolve them of their obligation to represent their client even before the trial court has adjudicated that issue—the direct effect of which would be to undermine the trial court's March 15 order by putting a stop to the very discovery that the trial court ordered.

II. Birnbaum & Godkin and Gross & Klein Cannot Show Any Irreparable Harm.

In order to obtain writ relief, petitioners must establish that they will suffer irreparable harm if the petition is not granted. (Code Civ. Proc., § 1086; *Los Angeles Gay and Lesbian Center*, *supra*, 194 Cal.App.4th at pp. 299-300.) Birnbaum & Godkin and Gross & Klein cannot show any irreparable harm that would result from denying their petition for a stay.

First, Birnbaum & Godkin and Gross & Klein still have not identified a genuine "unwaivable conflict" that would preclude them from participating in limited discovery aimed at allowing the trial court to investigate breaches of its orders. In fact, they have not identified any "unwaivable conflict" at all. ***Second***, Birnbaum & Godkin and Gross &

Klein misrepresent the case law on whether a stay is appropriate. ***Third***, a stay would irreparably harm Facebook.

A. Birnbaum & Godkin and Gross & Klein Have Not Identified an Unwaivable Conflict.

Birnbaum & Godkin and Gross & Klein's argument for irreparable harm is that an unwaivable conflict prevents them from ethically serving as counsel for Six4Three. (Pet. at 28-30.) The alleged conflict arises out of (1) Facebook's accusation that Birnbaum & Godkin and Gross & Klein conspired with Six4Three to disclose Facebook's confidential and highly confidential information in violation of multiple court orders; and (2) the trial court's finding that the crime-fraud exception applies. (Pet. at 19-21, 25-28.) Both these arguments are unavailing.

First, Birnbaum & Godkin and Gross & Klein do not explain how Facebook's allegations or the trial court's ruling creates an unwaivable conflict. This is nothing new. The trial court recognized that they had failed to identify the alleged conflict, and initially stated that it "found that there [was] no conflict without further evidence," although it took the motions to withdraw under submission. (PA483:24-PA484:6; PA341:13-PA344:4.) Likewise, in the order denying Birnbaum & Godkin and Gross & Klein's *ex parte* application for the same stay they are asking for here, the trial court found that Six4Three's counsel have "repeatedly asserted without articulating how allegations of misconduct creates an unwaivable

conflict between Six4Three and its counsel under this rule." (PA642:6-8.)

That remains true. Birnbaum & Godkin and Gross & Klein simply assert an "unwaivable conflict," without explaining how this supposed conflict prevents them from representing Six4Three in the limited proceedings that are live before the trial court. They do not identify how the conflict implicates their interests, or Six4Three's interests, or pits those interests against each other; they do not explain specific ways in which their defense or Six4Three's defense is impaired by the alleged conflict; they do not identify arguments, either on their behalf or on Six4Three's behalf, that the conflict prevents them from making; they do not identify actions they would take or that Six4Three would take, but for Birnbaum & Godkin and Gross & Klein's representation of Six4Three. (Pet. at 28-30.)

Second, Birnbaum & Godkin and Gross & Klein's own conduct shows that no "unwaivable conflict" exists. Birnbaum & Godkin and Gross & Klein first raised the supposed conflict at a November 30 hearing. (RA243:11-23.) Yet, they have continued to represent their client—where convenient—ever since. For example, Gross & Klein elected to prosecute a ***new appeal*** in this case even though Six4Three has other appellate counsel already involved in this case.[7] (See RA298 [notice of appeal from the trial

[7] Six4Three has separate appellate counsel who is representing it in the pending appeals of the trial court's anti-SLAPP rulings, Allison Ehlert of

court's October 31 and November 1 orders sealing documents that were later leaked, filed by Gross & Klein]; see also RA380-83 [Gross & Klein designating the record on appeal, just days before filing a written motion to withdraw claiming that withdrawal was mandatory due to an "unwaivable conflict"].)

Even after they filed a motion to withdraw based on the supposed, "unwaiveable conflict," Birnbaum & Godkin and Gross & Klein continued to represent Six4Three where they felt it was in their interest to do so. For example, they prepared and filed for their client an opposition to Facebook's motion to open discovery into Six4Three and its legal team's misconduct—the very motion that was granted to permit the very discovery that Birnbaum & Godkin and Gross & Klein now claim they are unwaivably conflicted from representing Six4Three on. (PA394.) Most recently, ***the day before*** requesting an ex parte stay of the trial court's March 15 order opening limited discovery on the grounds that they simply could not continue to represent their client even for the interim period until the trial court ruled on the motions to withdraw, Gross & Klein filed additional documents to continue to prosecute Six4Three's appeal of the

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Ehlert Appeals. (RA447-49; RA451-53.) If Birnbaum & Godkin and Gross & Klein believed that they genuinely had an unwaivable conflict, then Ms. Ehlert presumably would be litigating this new appeal in their stead.

trial court's sealing orders on March 26. (RA574-78.)

A lawyer does not get to pick and choose where they represent their client's interests and where they do not. "Attorneys do *not* have an absolute right to withdraw from representation at any time with or without cause." (Mark L. Tuft, et al., *California Practice Guide: Professional Responsibility* ¶ 10.21 (The Rutter Grp., Dec. 2018 Update) [emphasis in original].) If Birnbaum & Godkin and Gross & Klein genuinely had an unwaivable conflict, then they would not be able to initiate and prosecute a new appeal to challenge the sealing of the later-leaked documents or represent Six4Three in discovery motions seeking discovery into the leaks. The trial court recognized precisely that defect in Birnbaum & Godkin and Gross & Klein's logic when it held that their actions regarding Six4Three's new appeal of the sealing orders are "inconsistent with [their] assertion that they are 'legally and ethically barred from advising or representing SIX4THREE *under any circumstances*.'" (PA642:22-24 [emphasis in original].) As the trial court recognized, "***Six4Three's counsel cannot selectively pursue the matters it chooses to represent Six4Three***." (PA643:2-3.)

B. Birnbaum & Godkin and Gross & Klein's Cited Cases Do Not Support a Stay.

Birnbaum & Godkin and Gross & Klein argue that a stay is appropriate while the motions to withdraw are pending, but they are unable to cite any applicable authority.

First, Birnbaum & Godkin and Gross & Klein cite *Reed v. Superior Court* to argue that a stay "is appropriate where a writ is pending on the ruling of [a] motion to disqualify counsel, since it may potentially infect all subsequent trial court proceedings." (Pet. at 27.) Birnbaum & Godkin and Gross & Klein overlook that in *Reed*, the trial court had granted a stay while its denial of a motion to disqualify counsel was on appeal, and the Court of Appeal ***reversed*** and ordered the trial court to ***vacate*** the stay of proceedings. (*Reed v. Superior Court (Case Financial, Inc.)* (2001) 92 Cal.App.4th 448, 457, as mod. (Oct. 17, 2001).) Moreover, *Reed* was about whether an appeal of an order denying a motion to disqualify counsel automatically stayed the merits of the case; it was not about a motion to withdraw. (*Id.* at p. 450.) Nor was it about a stay while the motion to disqualify was pending; the trial court had already denied the motion. (*Ibid*.)

Reed did mention in *dicta* that "a ***reasonably persuasive*** showing that the claim of disqualification ***likely*** has merit will ***probably*** persuade the appellate court to stay the underlying proceedings pending resolution of the

disqualification issue." (*Id*. at p. 455.) Far from stating that a stay is appropriate whenever there is a claim for disqualification (or a motion to withdraw, which *Reed* did not address), however, *Reed* heavily qualified that this might be true only in some circumstances, and explicitly noted that "[i]n some cases, however, the claim of disqualification will be insubstantial or even frivolous." (*Id*. at p. 456.) Here, Birnbaum & Godkin and Gross & Klein have not shown irreparable harm or identified their unwaivable conflict or the specific prejudice that would occur absent a stay, and so they cannot even meet *Reed*'s *dicta* standard for when a stay might be appropriate for a writ about a different type of motion.

Second, Birnbaum & Godkin and Gross & Klein cite *Apple Computer, Inc. v. Superior Court (Cagney)* (2005) 126 Cal.App.4th 1253, 1264. (Pet. at 27.) Their citation to *Apple*, however, is merely to the portion of *Apple* that quotes *Reed*. (126 Cal.App.4th at p. 1263-64 [quoting *Reed*, 92 Cal.App.4th at p. 455].) *Apple* did not involve a stay; it merely reviewed the trial court's denial of motions to disqualify plaintiff's counsel in a class action, where one of the law firms employed the plaintiff and the other firm was co-counsel with that firm in other cases. (*Id*. at p. 1261.) The portion of *Apple* and *Reed* that Birnbaum & Godkin and Gross & Klein reference in their parenthetical is merely part of the legal standard set forth in the opinion, and the opinion itself focuses entirely on the merits of the motion for disqualification. (*Id*. at pp. 1263-64.) It says nothing about

whether a stay is appropriate when motions to withdraw are pending.

Finally, Birnbaum & Godkin and Gross & Klein cite *County of Los Angeles v. Superior Court (Martinez)* (1990) 224 Cal.App.3d 1446, 1451, for their proposition that "if a trial court has granted a motion for discovery of privileged information, it is appropriate for the appellate court to stay the discovery order while considering the writ petition." (Pet. at 28.) But in *County of Los Angeles*, the trial court granted a motion to compel and stayed its order. (224 Cal.App.3d at p. 1451.) The petitioners then filed a petition for writ of mandate, and the Court of Appeal stayed the trial court's order granting the motion to compel. (*Ibid*.) The key difference between *County of Los Angeles* and Birnbaum & Godkin and Gross & Klein's petition is that, in *County of Los Angeles*, the trial court had already granted a stay. Here, the trial court explicitly ***denied*** a stay. (PA641-43.) Contrary to Birnbaum & Godkin and Gross & Klein's representation in their petition, *County of Los Angeles* does not say anywhere that when a trial court grants a motion for discovery of privileged information, the appellate court must stay that order.

The bottom line is that Birnbaum & Godkin and Gross & Klein stretched the case law to the breaking point in their petition. The Court should instead look to *People v. Brown* (1988) 203 Cal.App.3d 1335, 1341. In *Brown*, defendant's counsel moved to withdraw, citing an irreconcilable conflict because the defendant indicated that he intended to present perjured

testimony at trial. (*Id*. at p. 1338.) Defendant's counsel cited the same Rule of Professional Conflict regarding mandatory conflict that Birnbaum & Godkin and Gross & Klein cite—then-rule 2-111(B), now rule 1.16(a). (203 Cal.App.3d at p. 1339; Pet. at 25, 29.) The trial court denied counsel's motion to withdraw and then denied counsel's subsequent request to continue the trial so that counsel could petition for a writ. (*Brown*, *supra*, 203 Cal.App.3d at pp. 1338, 1341.) The Court of Appeal held that the trial court did not abuse its discretion in either denying the motion to withdraw or denying the request for a continuance. (*Id.* at pp. 1341-42.) If denying a request for continuance of a criminal trial is not an abuse of discretion, even when defendant's counsel identified a clear, specific conflict in his ongoing representation of the defendant, then it was well within the trial court's discretion to deny Birnbaum & Godkin and Gross & Klein's ex parte application for a stay here.

C. A Stay would Irreparably Harm Facebook.

Although denying a stay would not cause Birnbaum & Godkin and Gross & Klein any irreparable harm, it would interfere with the trial court's investigation into the breaches of its orders and would irreparably harm Facebook to boot. While discovery into Six4Three and its legal team's past and potentially present leaks of Facebook's confidential and highly confidential information is stayed, the trial court and Facebook would have no way of getting to the bottom of what Facebook confidential and highly

confidential information was leaked or to whom—and thus no assurance that its confidential and highly confidential information will not continue to be leaked in dribs and drabs in newspapers and on file-sharing sites. (See, e.g., RA475-76 [describing continuing leaks of Facebook confidential and highly confidential information via *The Guardian* and public Github share].)

This is not a hypothetical concern. Just yesterday (April 16, 2019), NBC published a lengthy article describing the contents of Facebook's confidential and highly confidential documents that the trial court and Facebook did not know had been leaked, and stated that they had received "thousands of newly shared documents, [which] were anonymously leaked" to an investigative journalist that "shared them with a handful of media organizations." (Attachment 1 hereto [https://www.nbcnews.com/tech/social-media/mark-zuckerberg-leveraged-facebook-user-data-fight-rivals-help-friends-n994706].) If this Court imposed a stay, the trial court would be delayed in questioning Six4Three and its legal team regarding these most recent leaks, and Facebook would be delayed in obtaining basic discovery into how the documents got from Six4Three to the "investigative journalist" in the first place and where else they might be. Every day that goes by without answers to those questions, Facebook is exposed to the ongoing risk that these leaks will proliferate.

This continuing prejudice is only exacerbated by Six4Three's continued efforts to publicize the very documents it improperly leaked in the first place. While they have done everything possible to delay or defeat even the most basic investigation or discovery into their violations, Six4Three's principal and a member of its legal team have been engaging directly with the press to gain publicity for their campaign against Facebook, going so far as to participate in extended interviews and, apparently a photo shoot, with NBC. (Attachment 2 hereto [https://www.nbcnews.com/tech/social-media/inside-bikini-photo-startup-six4three-s-scrappy-battle-put-facebook-n995016].)

And if that were not enough, beginning in late February, Six4Three began posting online about this case, apparently in an effort to bring even more media and public attention to the documents it leaked and its campaign against Facebook. (See generally RA614-17.) For example, on March 20, Six4Three posted a 6,800-word missive in which it described and summarized Facebook confidential documents that Six4Three leaked to the DCMS Committee, and even provided links to those documents. (See generally RA619-32; see *id*. [referencing "emails like this one" and linking

to leaked copy of Exhibit 44 to the Godkin Anti-SLAPP Opp'n Declaration (May 17, 2018)].)[8]

III. In the Alternative, a Stay Should be Limited to Birnbaum & Godkin and Gross & Klein Only.

If the Court is inclined to grant Birnbaum & Godkin and Gross & Klein's request for a stay, the stay should be limited to discovery directed at Birnbaum & Godkin and Gross & Klein, and exclude discovery directed at Six4Three, Mr. Kramer, and Mr. Scaramellino.

The petition purports to seek a stay of "all proceedings." (Pet. at 22.) But counsel for Birnbaum & Godkin and Gross & Klein—i.e., Murphy Pearson and Wilson Elser—cannot seek such relief for Six4Three, because Murphy Pearson and Wilson Elser do not represent Six4Three. The trial court has twice admonished Six4Three's lawyers' lawyers on this point. (See RA634 & RA637.) If Murphy Pearson and Wilson Elser want to advocate for relief on Six4Three's behalf, they should file a notice of appearance for Six4Three. Until then, they may represent only the interests of Birnbaum & Godkin and Gross & Klein.

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[8] This post is a fresh violation of the protective order. (RA7-8 ¶ 3; RA9 ¶ 6 [specifying that designated information does not lose its protections if it is made public in violation of the protective order].) And if members of the legal team—past or present—are involved in Six4Three's online posts, these posts not only take advantage of the leak of information in violation of the Protective Order but also run afoul of the trial court's admonition regarding the Rules of Professional Conduct. (See PA533:8-17 [citing Rules Prof. Conduct, rule 3.6(b)(1)-(5)].)

Finally, even if Birnbaum & Godkin and Gross & Klein's concerns about a supposed unwaivable conflict had merit (they do not), the trial court's March 15 order opening discovery unquestionably encompasses materials as to which Birnbaum & Godkin and Gross & Klein's representation is irrelevant. As one example, discovery can and should proceed as to Mr. Kramer and/or Mr. Scaramellino's communications with third parties. These individuals are both represented by counsel, and no possible privilege claim on behalf of the Six4Three entity can lie as to communications with the media or governmental agencies to whom Six4Three was seeking to share its story.[9] Likewise, discovery should proceed into the actions of third parties that Six4Three retained as purported "experts" to determine what these individuals did with Facebook confidential and highly confidential information that was provided to them by Six4Three. One such "expert" has now refused to comply with multiple orders from the trial court to provide basic information regarding his compliance or non-compliance with the protective order, and the trial court should be allowed to take necessary steps to determine whether or not he has complied and enforce the order as appropriate. (PA602; PA489:17-PA490:6; PA507:26-PA509:12.) Accordingly, regardless of whether a stay

[9] Birnbaum & Godkin and Gross & Klein presumably recognize this because they stipulated to producing their own communications with third-party media and government entities. (RA296.)

is appropriate as to discovery directed at Birnbaum & Godkin or Gross & Klein (it is not), other discovery within the scope of the trial court's March 15 order should—indeed, in light of the prejudice that Facebook will suffer, ***must***—proceed.

IV. The Court Should Grant Facebook Its Costs.

Facebook respectfully requests that the Court grant its costs pursuant to California Rules of Court, rule 8.493(a)(1)(A). This is effectively the fourth time that Facebook has had to respond to Birnbaum & Godkin and Gross & Klein's meritless motions to withdraw—first, Facebook had to oppose their motions to withdraw; second, Facebook had to oppose their ex parte application for a stay of proceedings, which regurgitated the same arguments raised in the motions to withdraw; and third, Facebook had to oppose their ex parte application for leave to supplement their motions to withdraw as counsel. (PA332; PA596; RA563.) Now, Facebook has been forced to the burden and expense of opposing Birnbaum & Godkin and Gross & Klein's motions to withdraw, repackaged as a petition for a writ. Facebook thus respectfully requests an award of its costs. Conversely, in the event that the Court grants the petition, Facebook respectfully requests that Court deny costs to Birnbaum & Godkin and Gross & Klein in the interests of justice. (Cal. Rules of Court, rule 8.493(a)(1)(B).)

CONCLUSION

For the foregoing reasons, Birnbaum & Godkin and Gross & Klein have failed to show that extraordinary interlocutory relief is warranted, and the Court should deny their petition.

DATED: April 17, 2019

Respectfully submitted,

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FACEBOOK, INC.

Attachment 1

NEWS

SOCIAL MEDIA

Mark Zuckerberg leveraged Facebook user data to fight rivals and help friends, leaked documents show

Facebook's leaders seriously discussed selling access to user data – and privacy was an afterthought.

Leaked internal Facebook documents show that the plans to sell access to user data were discussed for years and received support from Facebook's most senior executives, including CEO Mark Zuckerberg and chief operating officer Sheryl Sandberg. Doug Chayka for NBC News / Getty Images

April 16, 2019, 1:30 AM PDT

By Olivia Solon and Cyrus Farivar

Facebook CEO Mark Zuckerberg oversaw plans to consolidate the social network's power and control competitors by treating its users' data as a bargaining chip, while publicly proclaiming to be protecting that data, according to about 4,000 pages of leaked company documents largely spanning 2011 to 2015 and obtained by NBC News.

The documents, which include emails, webchats, presentations, spreadsheets and meeting summaries, show how Zuckerberg, along with his board and management team, found ways to tap Facebook's trove of user data – including information about friends, relationships and photos – as leverage over companies it partnered with.

In some cases, Facebook would reward favored companies by giving them access to the data of its users. In other cases, it would deny user-data access to rival companies or apps.

Mark Zuckerberg leveraged Facebook user data, leaked documents show

APRIL 16, 201903:26

For example, Facebook gave Amazon extended access to user data because it was spending money on Facebook advertising and partnering with the social network on the launch of its Fire smartphone. In another case, Facebook discussed cutting off access to user data for a messaging app that had grown too popular and was viewed as a competitor, according to the documents.

All the while, Facebook was formulating a strategy to publicly frame these moves as a way of protecting user privacy.

Private communication between users is "increasingly important," Zuckerberg said in a 2014 New York Times interview. "Anything we can do that makes people feel more comfortable is really good."

But the documents show that behind the scenes, in contrast with Facebook's public statements, the company came up with several ways to require third-party applications to compensate Facebook for access to its users' data, including direct payment, advertising spending and data-sharing arrangements. While it's not unusual for businesses that are working together to share information about their customers, Facebook has access to sensitive data that many other companies don't possess.

Facebook ultimately decided not to sell the data directly but rather to dole it out to app developers who were considered personal "friends" of Zuckerberg or who spent money on Facebook and shared their own valuable data, the documents show.

Facebook denied that it gave preferential treatment to developers or partners because of their ad spending or relationship with executives. The company has not been accused of breaking the law.

A man poses for photos in front of the Facebook sign on the company's campus in Menlo Park, California, in 2014. Jeff Chiu / AP file

About 400 of the 4,000 pages of documents have previously been reported by other media outlets, and also by a member of the British Parliament who has been investigating Facebook's data privacy practices in the wake of the Cambridge Analytica scandal. However, this cache represents the clearest and most comprehensive picture of Facebook's activities during a critical period as the company struggled to adapt to the rise of smartphones following its rocky debut as a public company.

The thousands of newly shared documents were anonymously leaked to the British investigative journalist Duncan Campbell, who shared them with a handful of media organizations: NBC News, Computer Weekly and Süddeutsche Zeitung. Campbell, a founding member of the International Consortium of Investigative Journalists, is a computer forensics expert who has worked on international investigations including on offshore banking and big tobacco. The documents appear to be the same ones obtained by Parliament in late 2018 as part of an investigation into Facebook. Facebook did not question the authenticity of the documents NBC News obtained.

The documents stem from a California court case between the social network and the little-known startup Six4Three, which sued Facebook in 2015 after the company announced plans to cut off access to some types of user data. Six4Three's app, Pikinis, which soft-launched in 2013, relied on that data to allow users to easily find photos of their friends in bathing suits.

Facebook has acknowledged that it considered charging for access to user data. But Facebook has challenged the significance of those discussions, telling the Wall Street Journal last year and NBC News this month that the company was merely mulling various business models.

Facebook has also repeatedly said that the documents had been "cherry-picked" and were misleading. Facebook reiterated this stance when NBC News contacted the social media company for comment on the newly leaked documents.

"As we've said many times, Six4Three – creators of the Pikinis app – cherry picked these documents from years ago as part of a lawsuit to force Facebook to share information on friends of the app's users," Paul Grewal, vice president and deputy general counsel at Facebook, said in a statement released by the company.

"The set of documents, by design, tells only one side of the story and omits important context. We still stand by the platform changes we made in 2014/2015 to prevent people from sharing their friends' information with developers like the creators of Pikinis. The documents were selectively leaked as part of what the court found was evidence of a crime or fraud to publish some, but not all, of the internal discussions at Facebook at the time of our platform changes. But the facts are clear: we've never sold people's data."

The finding of "evidence of a crime or fraud" came from a preliminary decision by the judge in the Six4Three case about an earlier round of leaked documents.

NBC News has not been able to determine whether the documents represent a complete picture. Facebook declined to provide additional evidence to support the claim of cherry-picking.

Still, these freshly leaked documents show that the plans to sell access to user data were discussed for years and received support from Facebook's most senior executives, including Zuckerberg, chief operating officer Sheryl Sandberg, chief product officer Chris Cox and VP of growth Javier Olivan. Facebook declined to make them available for comment.

After NBC News contacted Facebook for comment, Facebook's lawyers wrote to the judge in the Six4Three case, claiming that Six4Three had leaked the documents to a "national broadcast network" and seeking to depose Six4Three's founders. NBC News received the documents from Campbell, who received them from an anonymous source. Six4Three denied leaking the documents.

When Facebook ultimately cut off broad access to user data in 2015, the move contributed to the decline of thousands of competitors and small businesses that relied on what Facebook had previously described as a "level-playing field" in terms of access to data. In addition to Pikinis, the casualties included Lulu, an app that let women rate the men they dated; an identity fraud-detecting app called Beehive ID; and Swedish breast cancer awareness app Rosa Bandet (Pink Ribbon).

The strategy orchestrated by Zuckerberg had some of his employees comparing the company to villains from Game of Thrones, while David Poll, a senior engineer, called the treatment of outside app developers "sort of unethical," according to the documents. But Zuckerberg's approach also earned admiration: Doug Purdy, Facebook's director of product, described the CEO as a "master of leverage," according to the documents.

Facebook declined to comment on these employee communications.

A PRIVACY MYTH

One of the most striking threads to emerge from the documents is the way that Facebook user data was horse-traded to squeeze money or shared data from app developers.

In the wake of the Cambridge Analytica scandal in early 2018 and rising awareness of the Six4Three case, Facebook has attempted to frame changes it made to its platform in 2014 and 2015 as being driven by concerns over user privacy. In statements to media organizations, Facebook has said it locked down its platform to protect users from companies that mishandled user data, such as Cambridge Analytica, as well as apps that spammed users' news feeds or were creepy, such as Six4Three's bikini-spotting app Pikinis.

However, among the documents leaked, there's very little evidence that privacy was a major concern of Facebook's, and the issue was rarely discussed in the thousands of pages of emails and meeting summaries. Where privacy is mentioned, it is often in the context of how Facebook can use it as a public relations strategy to soften the blow of the sweeping changes to developers' access to user data. The documents include several examples suggesting that these changes were designed to cement Facebook's power in the marketplace, not to protect users.

In Six4Three's case, for example, Facebook's head of policy Allison Hendrix acknowledged in a June 2017 deposition obtained by NBC News that the social network never received any complaints about the Pikinis app, nor did Facebook send Six4Three any policy or privacy violation notices. Six4Three, Hendrix confirmed, was playing within the rules Facebook had set for developers.

Despite this, Six4Three's access to data, specifically access to a user's friends' photos, was cut off in April 2015 as part of sweeping changes to Facebook's platform announced a year earlier, which affected as many as 40,000 apps. Six4Three shut down the app soon afterward.

Ted Kramer, founder of Six4Three. Peter DaSilva / for NBC News

"Our case is about Zuckerberg's decision to weaponize the reliance of companies on his purportedly neutral platform and to weaponize the private and sensitive data of billions of people," said Six4Three founder Ted Kramer.

A TURNING POINT FOR FACEBOOK

Facebook recognized early on that working with third-party app developers could help make the social network more interesting and drive the platform's expansion. Beginning in early 2010, Facebook created tools that allowed the makers of games (remember Farmville?) and other apps to connect with its audience in return for ensuring those users spent more time on Facebook.

Facebook achieved this through its "Graph API" (Application Programming Interface), a common means to allow software programs to interact with each other. In Facebook's case, this meant that third-party apps such as games could post updates on people's profiles, which would be seen by players' friends and potentially encourage them to play, too. Beyond that, it allowed the makers of those games to access a slew of data from Facebook users, including their connections to friends, likes, locations, updates, photos and more.

The Graph API – and particularly the way it let third parties promote their products to and extract data from a user's social connections – was a key feature of Facebook that Six4Three and thousands of other companies relied upon for viral marketing and user growth.

However, after a few years, Facebook decided the app developers were getting more value from the user data they extracted from Facebook than Facebook was getting out of the app developers, the documents show.

Facebook's evolution on privacy

April 21, 2010

Facebook's platform begins allowing apps to see data about users' friends.

May 18, 2012

Facebook goes public, launching on the stock market.

December 13, 2012

Ted Kramer formally incorporates his app development company, Six4Three.

Notes

Scroll for more
Sources: NBC News, media reports
Interactive: Robin Muccari / NBC News

After Facebook went public in May 2012, its stock price plummeted, which Zuckerberg later characterized as "disappointing." The company was in a desperate position, documents show, with users sharing fewer photos and posts on the platform as they spent more time on their cellphones. An internal Facebook presentation looking back at this period used the phrase "terminal decline" to describe the fall in engagement.

Facebook executives, including Zuckerberg and Sandberg, spent months brainstorming ways to turn the company around. An idea that they kept returning to: make money from the app partners, by charging them for access to Facebook's users and their data.

'SELL DATA FOR $"

Several proposals for charging developers for access to Facebook's platform and data were put forward in a presentation to the company's board of directors, according to emails and draft slides from late August 2012.

Among the suggestions: a fixed annual fee for developers for reviewing their apps; an access fee for apps that requested user data; and a charge for "premium" access to data, such as a user trust score or a ranking of the strongest relationships between users and their friends.

"Today the fundamental trade is 'data for distribution' whereas we want to change it to either 'data for $' and/or '$ for distribution,'" Chris Daniels, a Facebook business development director, wrote in an August 2012 email to other top leaders in the company discussing the upcoming presentation.

Discussions continued through October, when Zuckerberg explained to close friend Sam Lessin the importance of controlling third-party apps' ability to access Facebook's data and reach people's friends on the platform. Without that leverage, "I don't think we have any way to get developers to pay us at all," Zuckerberg wrote in an email to Lessin.

In the same week, Zuckerberg floated the idea of pursuing 100 deals with developers "as a path to figuring out the real market value" of Facebook user data and then "setting a public rate" for developers.

"The goal here wouldn't be the deals themselves, but that through the process of negotiating with them we'd learn what developers would actually pay (which might be different from what they'd say if we just asked them about the value), and then we'd be better informed on our path to set a public rate," Zuckerberg wrote in a chat.

Facebook told NBC News that it was exploring ways to build a sustainable business, but ultimately decided not to go forward with these plans.

"I just can't think of any instances where that data has leaked from developer to developer and caused a real issue for us."

Zuckerberg was unfazed by the potential privacy risks associated with Facebook's data-sharing arrangements.

"I'm generally skeptical that there is as much data leak strategic risk as you think," he wrote in the email to Lessin. "I think we leak info to developers but I just can't think of any instances where that data has leaked from developer to developer and caused a real issue for us."

Facebook told NBC News that this was an example of a cherry-picked email designed to bolster Six4Three's case.

Zuckerberg didn't know it at the time, but a privacy bug affecting an unnamed third-party app would create precisely this kind of strategic risk the following year, according to a panicked chatlog between Michael Vernal, who was director of engineering, and other senior employees.

It's not clear exactly what happened or which app was involved, but it appears that Zuckerberg's private communications could have leaked from Facebook to the external app in an unexpected way.

Vernal said that it "could have been near-fatal for Facebook platform" if "Mark had accidentally disclosed earnings ahead of time because a platform app violated his privacy."

"Holy crap," replied Avichal Garg, then director of product management.

"DO NOT REPEAT THIS STORY OFF OF THIS THREAD," added Vernal. "I can't tell you how terrible this would have been for all of us had this not been caught quickly."

Vernal and Garg did not respond to requests for comment.

'GOOD FOR THE WORLD' BUT NOT 'GOOD FOR US'

In late November 2012, Zuckerberg sent a long email to Facebook's senior leadership team saying that Facebook shouldn't charge developers for access to basic data feeds. However, he said that access to Facebook data should be contingent on the developers sharing all of the "social content" generated by their apps back to Facebook, something Zuckerberg calls "full reciprocity."

The existing arrangement, where developers weren't required to share their data back with Facebook, might be "good for the world" but it's not "good for us," Zuckerberg wrote in the email.

He noted that though Facebook could charge developers to access user data, the company stood to benefit more from requiring developers to compensate Facebook in kind – with their own data – and by pushing those developers to pay for advertising on Facebook's platform.

The endgame: to ensure Facebook maintained its dominant position in the market.

"The purpose of the platform is to tie the universe of all the social apps together so we can enable a lot more sharing and still remain the central social hub," Zuckerberg said in the email.

Facebook told NBC News that the focus of "full reciprocity" was to enable users to share their experiences within external apps with their friends on Facebook, not about providing Facebook with user data.

CUTTING DEALS

With Zuckerberg's vision for Facebook set, the company began making deals with some of its most valued partners, including dozens of app developer friends of Zuckerberg and Sandberg. Facebook whitelisted their access to feeds of user data while restricting that same access to apps that Facebook viewed as competitors.

These data access deals prepared key partners, including Tinder, Sony and Microsoft, for sweeping changes to the Facebook platform that the company planned to announce at its annual developer conference in April 2014 and enforce within a year.

In one instance, described in June 2013 documents, Amazon received special treatment for the launch of a group gifting product, despite the fact that it competed with one of Facebook's own products.

"Remind me, why did we allow them to do this? Do we receive any cut of purchases?" Chris Daniels, then Facebook's director of business development, asked in an email.

"No, but Amazon is an advertiser and supporting this with advertisement … and working with us on deeper integrations for the Fire," Amazon's smartphone, replied Jackie Chang, who worked with Facebook's "strategic partners."

Amazon released a statement to NBC News: "Amazon uses publicly available APIs provided by Facebook in order to enable Facebook experiences for our products and only uses information in accordance with our privacy policy."

Apps that were not considered "strategic partners" got different treatment. In a March 2013 discussion, Justin Osofsky, then director of platform partnerships, described restricting the MessageMe app from accessing Facebook data because it had grown too popular and could compete with Facebook messages. He asked colleagues to see if any other messenger apps have "hit the growth team's radar recently."

"If so, we'd like to restrict them at the same time to group this into one press cycle," he wrote in an email.

'IT'S SORT OF UNETHICAL'

Deal negotiations created confusion among partners who had grown accustomed to unfettered access to Facebook user data.

"We gave a bunch of stuff 'for free' historically (data, distribution) and now we're making you 'pay' for it via reciprocal value," Vernal, director of engineering, wrote in an email in June 2013. He added: "The confusing thing here is that we haven't really announced these changes publicly/broadly yet."

Some Facebook employees were unhappy about this direction, particularly the way the company appeared to be blocking competitors from accessing data.

Here's an extract from a December 2013 chatlog between several senior engineers talking about the changes:

Bryan Klimt: "So we are literally going to group apps into buckets based on how scared we are of them and give them different APIs? … So the message is, 'if you're going to compete with us at all, make sure you don't integrate with us at all'? I'm just dumbfounded."

Kevin Lacker: "Yeah this is complicated."

David Poll: "More than complicated, it's sort of unethical."

Lacker and Poll declined to comment. Vernal and Klimt did not respond to requests for comment.

Facebook declined to comment on the employee exchanges.

THE PR SPIN

When it came to publicly announcing the sweeping changes at Facebook's annual F8 developer conference in April 2014, members of the communications team worked with Zuckerberg to craft a narrative around user trust, not competition or profitability.

In a March 2014 email discussing Zuckerberg's keynote speech at the event, where he was due to announce the removal of developers' access to friends' data, Jonny Thaw, a director of communications, wrote that it "may be a tough message for some developers as it may inhibit their growth."

"So one idea that came up today was potentially talking in the keynote about some of the trust changes we're making on Facebook itself. So the message would be: 'trust is really important to us – on Facebook, we're doing A, B and C to help people control and understand what they're sharing – and with platform apps we're doing D, E and F.'"

If that doesn't work, he added, "we could announce some of Facebook's trust initiatives in the run up to F8" to make the changes for developers "seem more natural."

Facebook told NBC News that it was "completely reasonable" for someone on the communications team to discuss the best way to get the message out on changes to the platform.

User trust was crucial when Zuckerberg delivered his speech at the event on April 30, 2014.

Facebook CEO Mark Zuckerberg delivers the keynote address at the F8 developer conference in San Francisco in 2014. Ben Margot / AP file

"Over the years, one of the things we've heard over and over again is that people want more control over how they share their information, especially with apps, and they want more say and control over how apps use their data," he told the audience of journalists and developers. "And we take this really seriously because if people don't have the tools they need to feel comfortable using your apps, that's bad for them and that's bad for you."

Attachment 2

NEWS

SOCIAL MEDIA

Inside bikini-photo startup Six4Three's scrappy battle to put Facebook on trial

The David vs. Goliath contest pits a small startup against one of the most powerful technology companies in the world.

Ted Kramer, founder of Six4Three, at Baker Beach in San Francisco. Peter DaSilva / for NBC News

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By Olivia Solon and Cyrus Farivar

REDWOOD CITY, Calif. – Ted Kramer seemed on edge. While sitting at a Starbucks store recently talking to a reporter, he kept looking over his shoulder mid-conversation, scanning people and cars passing by.

For years, Kramer, 35, founder of the now-defunct startup app developer Six4Three, has been involved in a high-stakes legal battle with Facebook. He suspects the technology company has hired people to surveil him, because he says he has seen people taking photos outside his San Francisco apartment.

Facebook says the surveillance claim is "absolute fantasy" and denied monitoring Kramer.

Kramer's concern is far from the most bizarre thing about his lawsuit, which has prompted an investigation by the British Parliament and shows no sign of resolution.

The David vs. Goliath contest pits Kramer's small startup, which in 2013 built a short-lived app to identify Facebook photos of users' friends in bikinis, against one of the most powerful technology companies in the world. Six4Three sued Facebook in 2015 in state court in San Mateo County after Facebook restricted its access to the user data that its app, called Pikinis, and thousands of other apps relied on to function.

Mark Zuckerberg leveraged Facebook user data, leaked documents show
APRIL 16, 201903:26

The case started small, and initially attracted little notice beyond tech blogs, but it has grown into a massive headache for Facebook. Over the course of the case, the social media giant was forced to turn over thousands of pages of internal documents, which show Facebook's years-long efforts to control its competitors by sharing or withholding Facebook user data. The documents – some of which were published by the British Parliament last year and more of which were recently obtained by Duncan Campbell, a British journalist who shared them with NBC News and other media outlets – show how Facebook publicly described its decisions as driven by user privacy concerns, while the company was actually focused on threats from competitors.

"It's like we are fishing in this tiny boat with no one else around and we somehow managed to hook a massive great white shark on our line," Kramer said in his first extensive public comments on the case, a lengthy emailed response to questions that were screened by his attorney. The emails were exchanged between meetings in San Francisco and Redwood City.

"We've kept it on the line for four years and have been slowly but surely reeling it in," Kramer continued in one of the emails. "The more we reel it in, the more tricks it finds to try to yank itself off the line. But it's still on that line. It has almost tipped our boat over a few times and it may end up tipping the boat over very soon. But we will hold onto that rod even while drowning. We'll keep pulling the line in. We might go down, but the shark's coming with us."

Facebook reiterated its view that Six4Three's lawsuit is "meritless" and in an emailed statement questioned the startup's claims about what the internal documents show.

"As we've said many times, Six4Three – creators of the Pikinis app – cherry-picked these documents from years ago as part of a lawsuit to force Facebook to share information on friends of the app's users," Paul Grewal, Facebook's deputy general counsel, told NBC News in a statement. "The set of documents, by design, tells only one side of the story and omits important context. We still stand by the platform changes we made in 2014/2015 to prevent people from sharing their friends' information with developers like the creators of Pikinis."

NBC News has not been able to determine whether the documents represent a complete picture. Facebook declined to provide additional evidence to support its view that they were cherry-picked.

Facebook has publicly painted Six4Three as an unsuccessful company that sought to exploit the same privacy vulnerabilities in Facebook's platform as the data-harvesting boogeyman Cambridge Analytica.

Mark Zuckerberg attends the annual Allen and Company conference in Sun Valley, Idaho, in 2018. Drew Angerer / Getty Images file

But some experts believe the significance of Kramer's lawsuit goes far beyond an app that might be viewed as unsavory.

"Ted is at the center of one of the most important questions of our decade: How can personal information and privacy be used to harm competition?" said Ashkan Soltani, who previously served as the Federal Trade Commission's chief technologist and is now an independent privacy researcher based in Oakland, California.

Still, Kramer's crusade has found few public allies in the tech industry.

At least half a dozen prominent investors and startup founders told NBC News in private conversations that they're rooting for Six4Three, but that they would not say anything publicly that could harm their relationship with the social network.

As a result of the lawsuit, Kramer fears becoming an outcast in Silicon Valley. But his goal has not changed: to put Facebook's entire business model on trial – particularly what he views as the company's bait-and-switch of offering Facebook user data to apps like Pikinis and then removing it.

"This is all because I am standing up for what is right and trying to hold Facebook accountable for its fraud," Kramer said in an email, "something state and federal governments should have done a long time ago."

SIX4THREE'S CASE AGAINST FACEBOOK

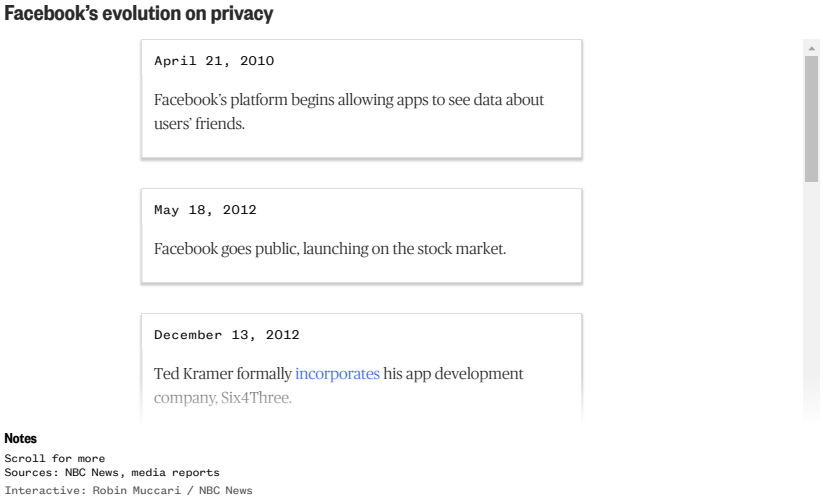
Six4Three's legal case is relatively simple: The startup alleges Facebook never gave it a fair chance to compete.

Six4Three argued in its 2015 complaint that it created a business model in 2013 based on Facebook's promise of access to user data under a system known as the "Graph API."

From 2010 until April 30, 2015, the Graph API gave all Facebook apps access to a vast dataset of not only individual users, but their friends as well. This trove included private messages, check-ins, events, locations, relationships, and – crucially for Six4Three – photos.

Six4Three's app, Pikinis, and thousands of other apps of that era, such as Tinder and Vine, were predicated on having relatively easy access to Facebook user data.

But then, in April 2014, Facebook announced that it would make the Graph API far less permissive, removing apps' access to the data. All older apps were given a year to retool.



Six4Three sued on April 10, 2015, 20 days before the older version of Graph API was shut down.

In Six4Three's most recent amended complaint, filed in January 2018, the startup accuses Facebook of a "series of fraudulent and anti-competitive schemes" designed by its CEO, Mark Zuckerberg. According to leaked documents from the Six4Three lawsuit, Zuckerberg began efforts to shut down apps' access to user data in 2011 and 2012 – several months before Six4Three was founded.

If Facebook had been transparent about those efforts, "then Six4Three never would have started its business," Kramer said.

Among a long list of things that Six4Three has asked the court to impose is a restoration of the earlier version of the more permissive Graph API. That's something Facebook has vowed not to do.

A Facebook spokeswoman noted that the Pikinis app had not even fully launched in the spring of 2014 when the company announced that apps' access to user data would be shut down.

HOW TED KRAMER STARTED SIX4THREE

Kramer didn't set out to become Facebook's antagonist. In fact, he began his career as a baseball player.

In 2007, after he finished college, Kramer played one season for the Haar Disciples, a professional baseball team outside Munich. (The name of his startup is a nod to his love of America's pastime: a "six-four-three double play.")

Kramer returned home to New York in 2007 and soon began working as a teacher. He later joined his high school friend Thomas Scaramellino's energy software company, Efficiency 2.0. After the startup sold to a larger company, Kramer joined WeWork in 2013 and oversaw the rollout of its co-working spaces to new cities across the United States and Europe.

Shortly before starting at WeWork, Kramer attended a meetup group in New York focused on machine learning. He was "enthralled" by a professor's talk on visual pattern recognition software that could automatically classify species of birds.

This fascination led him to found Six4Three in late 2012, using $250,000 in funding from Scaramellino. He built the company while employed at WeWork.

Scaramellino declined to comment.

Kramer said he didn't set out to create an app to find bikini photos – he initially wanted an app to find sports logos and other brand icons.

The plan, Kramer said, was to use Facebook photos to train software that could do this. He chose to focus on an "admittedly low-brow" application as a provocative way to get young adults to consent to sharing their Facebook photos, he said.

Pikinis soft-launched in 2013 and received some media coverage characterizing the app as "creepy."

But Facebook received no complaints about the app while it was live, according to the leaked internal documents, and never sent Six4Three any notices of privacy violations, according to Kramer.

"Facebook continues to tell the court and the media that it shut down Six4Three because it was a sketchy app and wanted access to data that Facebook had locked down allegedly for privacy reasons," Kramer said. "That is complete pablum. It's simply not what happened."

A Facebook spokeswoman told NBC News that the company did not mislead Six4Three or other app developers.

"They claim that we promised developers unrestricted access to data forever, which is not true," the spokeswoman said.

Facebook has previously noted that Six4Three attracted only $412 in app download sales.

FEW ALLIES FOR SIX4THREE

Six4Three has sought allies in its legal fight, starting a website inviting aggrieved companies to its side. (Facebook characterized the website as "slander.")

But Six4Three has had a tough time drawing support for two reasons: First, Pikinis is a hard app to defend, and second, few want to take on one of the largest companies in the world.

Justin Brookman, a former Federal Trade Commission lawyer who is now the director of consumer privacy and technology policy at the Consumers Union, was blunt: "This app should not exist. I'm sorry."

He added that while he agrees with Six4Three that Facebook's strategy should be scrutinized, the company does not make a sympathetic victim. Even Facebook skeptics may find reasons not to side with Six4Three, he said. "If Cambridge Analytica was suing Facebook for stopping access, I also don't think they would get allies, no matter how Facebook may be annoying or making bad choices," he said. "The enemy of my enemy is not always my friend."

Kramer said that Six4Three has received supportive emails and phone calls from startup founders and investors. But few have been willing to publicly denounce the company over fears that it could jeopardize their relationship with the platform, according to both court filings and NBC News' private conversations with several founders.

Ali and Hadi Partovi, the entrepreneur and investor brothers who co-founded the learn-to-code platform Code.org, for example, expressed sympathy with Six4Three in emails and depositions included in court filings.

"Confidentially, Ali and I agree with a lot of this, and it was a very emotional and trying experience to bet our company on the Facebook platform, only to see the platform turn into quicksand and see our investment lose value overnight," Hadi Partovi said in an email to Six4Three's attorney David Godkin in August 2017 that referred to the difficulties the brothers had when their music startup iLike worked with Facebook in the 2000s.

“However, given our personal relationships with Sheryl Sandberg and Mark Zuckerberg, I’m not sure we’d want to be part of a formal litigation effort,” Partovi said. “We’d have much more to lose than to gain.”

In 2016, Facebook donated $15 million to the brothers’ Code.org nonprofit.

Hadi Partovi released a statement to NBC News: "While most people who bet on the early Facebook Platform last decade felt badly about the outcome, Facebook probably lost the most after investing in a platform that didn’t live up to its potential. I trust that Sheryl and Mark gained valuable lessons and will draw on this experience in the future. I have moved on, and I’m sure so have others."

A Facebook spokeswoman said of Six4Three: “The idea that they can’t get anyone to join them because of personal relationships is ridiculous.”

Facebook CEO Mark Zuckerberg in 2010. Paul Sakuma / AP file

Only a handful of startups affected by Facebook’s platform changes have been willing to speak on the record about the case.

“I’m not super excited to say that I’m going to get in the ring with Facebook, because I have a company to build and they have a lot more money than me,” Nick Soman, the former CEO of the matchmaking app LikeBright and current CEO of health care startup Decent, told NBC News.

Only one other startup – Styleform IT, a one-person company based in Sweden – has brought a lawsuit like Six4Three’s. Filed in state court in San Francisco, that case’s next hearing is scheduled for June. Facebook reiterated earlier comments that Styleform IT’s lawsuit was “meritless.”

‘MY REPUTATION IS AT RISK’

While Kramer and Scaramellino have been struggling to bolster their ranks, they have hurt their own cause. Months before Six4Three’s lawsuit was set to go to trial in April 2019, Kramer angered the judge overseeing the case late last year after releasing a cache of sealed documents to a British member of Parliament.

In the run-up to a business trip to London last fall, Kramer was given a series of parliamentary orders to hand over a set of private documents that were part of the ongoing Six4Three lawsuit. While Kramer initially said that he could not provide them as they were under seal by the court, he eventually complied. That decision set off a legal firestorm in California, particularly after the member of Parliament, Damian Collins, published many of the sealed documents.

The San Mateo County judge hearing the Six4Three case called Kramer’s release of sealed documents a “compromise of the integrity of our litigation system” during a hearing last month.

Since the London episode, Six4Three’s lawyers have tried to quit. Kramer and Scaramellino have tried to find alternate lawyers to represent Six4Three, but Kramer said that the first six firms they approached would not take on the case because of a conflict: They already count Facebook as a client.

Facebook says the implication that the company has blocked Six4Three’s ability to hire new counsel is “ridiculous.”

After NBC News contacted Facebook for comment on the documents leaked to NBC News and the Six4Three case, Facebook’s lawyers wrote to the judge, claiming that Six4Three had leaked the documents to a “national broadcast network” and seeking to depose Six4Three’s founders. Six4Three denied leaking the documents.

Kramer is trying to build a new co-working office space startup, but he says the legal battle has left him on the brink of personal bankruptcy.

“It means my new business is at risk, living in San Francisco is at risk, acting as a consultant is at risk, my reputation is at risk, finding employment is at risk,” Kramer told NBC News.

Facebook, he said, wants “to financially destroy me and everyone associated with Six4Three’s efforts before the full truth can be exposed in front of a jury at trial.” (Facebook said that Kramer’s claim that the company is trying to ruin him and his associates is also “ridiculous.”)

Nonetheless, Six4Three is pressing on.

“The past few months have been extremely stressful,” Kramer said, “but the way I handle that is by continuing to remind myself that I am doing the right thing, and giving up is not an option.”

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But despite Facebook's public focus on privacy, staff member emails described confusion over the way third-party apps could override users' privacy settings.

Even if users locked down their account so that their photos and other data were visible to "only me," those photos could still be transferred to third parties, according to the documents.

In April 2015, Connie Yang, a product designer, told her colleagues that she'd discovered apps collecting profile data she had marked as "only me" and displaying it to "both you and *other people* using that app."

"While 'whoa how did you start working at Casterly Rock' is a fun opener," she wrote, referring to the ancestral stronghold of the most fearsome family in "Game of Thrones," "isn't this directly violating what we tell users is 'only me'?"

Yang did not respond to requests for comment.

Facebook said this was another example of cherry-picked emails.

THE DOCUMENTS' LEGACY

Even though Facebook eventually decided not to charge developers directly for access to user data, the extensive discussions around its monetary value, shown in the leaked documents, could create lasting problems for the company, privacy and policy experts say.

The biggest threat Facebook faces now is not competition but antitrust regulation, which is designed to promote fair competition among companies for the benefit of consumers, using fines or restrictions on mergers and acquisitions.

Regulators have typically struggled to build robust antitrust cases against technology companies that offer services to users for free. If the product is free, then it's harder to argue that the consumer is being harmed by a monopoly.

But if regulators can show that users were paying for access to Facebook with their personal data, and that Facebook valued that data as leverage against competitors, that could expose Facebook to an antitrust complaint, said Jason Kint, CEO of Digital Content Next, a trade association representing digital publishers.

"These emails clearly establish the value of consumer data to Facebook," Kint said. "It shows that it is not free."

Facebook said that the service has always been free for users and developers.

In February, the Federal Trade Commission announced a task force to monitor anti-competitive behavior in the tech industry to, in the words of FTC chair Joseph Simons, "ensure consumers benefit from free and fair competition."

Policymakers have called for the FTC to investigate Facebook specifically for violating antitrust laws.

The company "appears to have used its dominance to cripple other competitive threats by cutting them off from its massive network," Rep. David Cicilline, D-R.I., chairman of the House Judiciary antitrust subcommittee, wrote in a New York Times op-ed last month.

Facebook appears to be preparing for the inevitable, with Zuckerberg writing his own op-ed in The Washington Post in March calling for regulation in areas including harmful content and election integrity, but not antitrust. Facebook watchers saw this show of willingness as an attempt by Zuckerberg to curry favor with policymakers at a time when many are baying for the company's blood.

Ashkan Soltani, a privacy expert and former FTC chief technologist, said that Zuckerberg is approaching the looming threat of regulation with "bravado" and trying to "leverage things for his benefit."

Meanwhile, David Carroll, a professor at the New School, who pursued legal claims in the U.K. in the wake of the Cambridge Analytica data scandal, says Zuckerberg is "bracing for impact."

"When the penalty hits they can be like, 'Yeah, we agree, we deserve this fine.' It positions them to be conciliatory," Carroll said.

The "master of leverage" strikes again.

This report has been prepared and published in conjunction with Duncan Campbell (U.K.), Computer Weekly (U.K.) and Süddeutsche Zeitung (Germany).

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached Response to Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief is proportionally spaced, has a typeface of 13 points or more, and contains 6,834 words, excluding the cover, the certificate of interested entities or persons, the tables, verification, the signature block, and this certificate. Counsel relies on the word count of the word processing program used to prepare this brief.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 17, 2019, at San Francisco, California.

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